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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1148

THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.,

Appellant,

versus

HUGH B. COTTRELL, M.D., HEALTH OFFICER,
STATE OF MISSISSIPPI,

Appellee.

Appeal from the United States District Court for the
Southern District of Mississippi

BRIEF FOR THE APPELLANT

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June 28, 1975

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OPINIONS BELOW

The single-judge opinion of the United States District Court for the Southern District of Mississippi (Jurisdictional Statement, page 1a) is unreported. The opinion of the three-judge court (Jurisdictional Statement, page 8a) is reported at 383 F.Supp. 569.

JURISDICTION

This suit was brought pursuant to Sections 1331 and 2201 of Title 28 of the United States Code by The Great Atlantic & Pacific Tea Company, Inc. (hereinafter

referred to as A&P or Appellant) against Hugh B. Cottrell, M.D., Health Officer, State of Mississippi (hereinafter referred to as Mississippi). The three-judge court, constituted under 28 U.S.C. §2281, rendered its opinion on October 28, 1974, denying the relief. Judgment was entered on November 13, 1974, and Appellant filed its Notice of Appeal to this Court on December 11, 1974. Probable jurisdiction was noted on May 12, 1975.

STATE REGULATION INVOLVED

Section 4560-14 of the Mississippi Code of 1942, as amended, authorizes the Mississippi State Board of Health to enact regulations of state-wide force concerning inspection of milk and milk products sold in the state. Pursuant to that authority, in 1967 the Mississippi State Board of Health enacted Section 11 as follows:

> Section 11. MILK AND MILK PRODUCTS FROM POINTS BEYOND THE LIMITS OF ROUTINE INSPECTION
>
> Milk and milk products from points beyond the limits of routine inspection of the state of Mississippi or its police jurisdiction, may be sold in the state of Mississippi or its police jurisdiction, provided they are produced, pasteurized, and labeled under regulations which are substantially equivalent to this Regulation and have been awarded an acceptable milk sanitation compliance rating of 90 percent or above made by a state milk sanitation rating officer certified by the U.S. Public Health Service, and Provided *further, that the regulatory agency who has jurisdiction accepts Grade A milk and milk products produced and processed in Mississippi on a reciprocal basis. . . .* (Regulations Governing the Production and Sale of Milk and Milk Products, Section 11, emphasis added.)

QUESTIONS PRESENTED

May the State of Mississippi, consistent with the Commerce Clause, deny A&P the right to export into Mississippi milk fully satisfying Mississippi's health standards solely because the State of Louisiana has not signed a reciprocity agreement with the State of Mississippi? A related question is whether Mississippi enforcement policy, allowing certain Louisiana milk processors to export into Mississippi but denying that right to A&P, unconstitutionally deprives A&P of the equal protection of the laws in violation of the Fourteenth Amendment.

STATEMENT

A&P processes milk and other dairy products at its Kentwood, Louisiana, plant for delivery to its retail stores in Louisiana and Mississippi. Much of the raw milk processed at the plant comes from Mississippi producers.

The investment in the Kentwood plant was made specifically in anticipation of exporting processed milk into A&P's retail stores in Mississippi. A&P's investment in the Kentwood plant exceeds one million dollars and throughout much of these proceedings A&P has suffered actual irreparable losses of up to

$2,500.00 per week because of the refusal of Mississippi officials to allow milk from the Kentwood plant into Mississippi.

A&P has complied fully with all health related requirements of the Mississippi Regulation, within the meaning of Section 11. Since Mississippi's health officials refused to inspect A&P's plant and the milk processed there, they cannot know whether their state's standards for domestic producers could be or are being met. Moreover, those standards which are imposed on Louisiana processors currently distributing milk in Mississippi are the same by which A&P is tested.

The sole reason milk from the Kentwood plant has not been accepted in Mississippi is that the State of Louisiana has not signed a reciprocity agreement with the State of Mississippi. Mississippi offers to accept imported milk meeting Louisiana standards (but not necessarily meeting Mississippi standards) if Louisiana will reciprocate. But, Mississippi does not stop there. Instead of merely refusing to waive its own standards when Louisiana refuses to do so, Mississippi totally bans importation of milk from states not having reciprocity agreements regardless of the milk's quality, except as listed below. As a result, Louisiana milk is rejected by Mississippi even though it has never actually been judged against the standards required of Mississippi milk.

Mississippi does accept milk from Louisiana processors such as Borden Co., Franklinton; Borden Co., New Orleans; Sealtest Dairy Products, New Orleans; and Superbrand Dairy Products, New

Orleans; which were importing milk into Mississippi prior to the adoption of Section 11 in 1967. These Louisiana processors are allowed to export milk to Mississippi without a reciprocity agreement, and without Mississippi inspection.

ARGUMENT

I. Section 11 imposes an unconstitutional burden on interstate commerce.

Mississippi passed a sanitary code which includes a section on the importation of milk. The regulation establishes two requirements: (1) out-of-state milk must be processed under regulations substantially equivalent to Mississippi's Regulation (which contains detailed health standards), and (2) the exporting state must have signed a reciprocity agreement with the State of Mississippi. The first requirement, which serves to protect the health and safety of Mississippi residents, is constitutional. The second requirement, which conditions the right of A&P to engage in interstate commerce upon some action by Louisiana, is not.

A state may not burden the free flow of interstate commerce. *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964). However, reasonable legislation, which an enacting state demonstrates is designed to protect the health and safety of its citizens, may incidentally burden the free flow of interstate commerce. *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346 (1939); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1934). Here, the necessary result of Section 11 — protecting the economic welfare of state

businessmen from foreign competition or insuring the access of state businessmen to foreign markets — though published uner the guise of a safety and health measure, is not a legitimate exercise of a state's police power. *Dean Milk Company v. City of Madison, Wisconsin*, 340 U.S. 349 (1951); *Hood & Sons v. DuMond*, 336 U.S. 525 (1949).

The actual effect of the Mississippi reciprocity rule demonstrates the transparency of Mississippi's argument that the rule is intended to insure the wholesomeness of imported milk. The reciprocity agreement permits Mississippi to waive its requirements if Louisiana will waive its standards for imported Mississippi milk. Since Mississippi argues that its health standards are stricter than those imposed in Louisiana, the result of the reciprocity rule would be to *lower* the standards for imported milk if the exporting state will agree to a political arrangement desired by the State of Mississippi. Any contention that this reciprocity provision, allowing *lower* milk standards, ensures a more sanitary supply of milk is frivolous.

On the other hand, if Louisiana's milk is processed under standards more stringent than those in effect in Mississippi. Mississippi's insistence on a reciprocity agreement (with the consequent right to export milk to Louisiana) and Louisiana's accession would result in *less* healthful milk for Louisiana citizens. In either case, the regulation creates an overt and substantial obstruction to the free flow of interstate commerce without regard to wholesomeness.

Mississippi may grant an importer the privilege of importing milk that does not meet the Mississippi standards, while meeting its own state's standards, on the condition that the exporting state will reciprocate. If the exporting state refuses to reciprocate, then Mississippi may refuse to extend this privilege, and may insist that the out-of-state milk meet Mississippi's own stricter standards. In the absence of a reciprocity agreement, Mississippi must inspect out-of-state processors where, as here, there has been an offer to pay reasonable expenses, or suffer a permanent injunction against the enforcement of the reciprocity provision.

Mississippi cannot defend Section 11 by arguing that the Louisiana practice is invalid, and by further arguing that Mississippi will not abide by the Constitution unless Louisiana first agrees to. The Appellant is A&P, not Louisiana. A&P has no control over Louisiana or what regulations that state adopts. A&P brought suit against Mississippi, and it is that state which should be enjoined from acting unconstitutionally.

II. Section 11, as applied, violates the guarantee of equal protection of the law.

In deciding whether or not Section 11 violates the Equal Protection Clause of the Fourteenth Amendment, the test is whether the regulation is rationally suited to achieve a lawful objective of the state. *McGowan v. Maryland*, 366 U.S. 420 (1961). Measured by this standard, Section 11, as applied, violates the Fourteenth Amendment.

Mississippi allows the importation of milk from at least four Louisiana dairies even though that milk does not meet Mississippi's standards for domestic processors and even though Louisiana has not signed a reciprocity agreement. Mississippi offers no justification for this anomaly.

More importantly, no rational basis, associated with protection of a wholesome supply of milk, could be advanced. Louisiana milk, supposedly inferior to Mississippi's milk, is being consumed in Mississippi without that state's inspection. This practice is further evidence that the real aim and exclusive effect of the reciprocity rule is not health; but, rather, is a protectionist scheme for the economic well-being of Mississippi dairy processors.

CONCLUSION

For the foregoing reasons, this Court should reverse the lower court's judgment.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that I have this ____ day of June, 1975, mailed three copies of the foregoing Brief for the Appellant by certified mail, return receipt requested, postage prepaid to Mr. A. F. Summer, Attorney General, State of Mississippi, Post Office Box 220, Jackson, Mississippi 39205 and to Mr. Heber A. Ladner, Jr., Suite 1638, Capital Towers, Jackson, Mississippi 39205.